

# ADVOCATING FOR 290 REGISTRANTS IN THE ERA OF CORONAVIRUS AND COURT CLOSURES

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## I. INTRODUCTION

The authors are advocates for one of the most marginalized and legally underserved constituencies in our society: persons convicted of an offense that requires them to register as a sex offender (“registrants”).<sup>1</sup> This essay addresses some unique challenges faced by registrants during the COVID-19 pandemic.

At this time, California has over 147,000 registrants,<sup>2</sup> although the registry impacts millions of others who are their spouses, parents, partners, children, extended family members, business associates, and friends.<sup>3</sup> As of this writing, sex offender registration in California is a lifetime obligation, even for a misdemeanor conviction that occurred decades ago.<sup>4</sup> California’s

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1. The authors prefer the terms “registrants” or “persons required to register as a sex offender” to remind readers that the legal requirement to register is the only basis upon which these people comprise a meaningfully distinct group.

2. CAL. SEX OFFENDER MGMT. BD., ANNUAL REPORT 17 (2019), [http://casomb.org/pdf/2019\\_Annual\\_Report.pdf](http://casomb.org/pdf/2019_Annual_Report.pdf).

3. See, e.g., HUM. RTS. WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S. 37-38 (May 2013), <https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us#>; see also Steven Yoder, *Collateral Damage: Harsh Sex Offender Laws May Put Whole Families at Risk*, ALJAZEERA (Aug. 27, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/8/27/harsh-sex-offender-laws-may-put-whole-families-at-risk.html>.

4. See CAL. PENAL CODE § 290(b) (West 2014).

lifetime registration requirement therefore persists long past the point at which even once “high risk” registrants are statistically likely to reoffend.<sup>5</sup> This lifetime obligation has resulted in an ever-expanding registry, with few, if any, opportunities for removal through demonstrated rehabilitation.<sup>6</sup>

In light of the myriad exclusions of and restrictions upon registrants in daily life, it was unsurprising, though still alarming, when law enforcement authorities in California excluded registrants from their efforts to combat the most salient public health crisis of our time, the COVID-19 pandemic.<sup>7</sup> It goes without saying that registrants are just as likely to contract, transmit to others, or die from COVID-19 as anyone else. Nevertheless, during the early days of the pandemic, the authorities in California continued to neglect registrants by categorically excluding them from the state’s efforts to mitigate the spread of the coronavirus, such as the early release of vulnerable inmates from custody.<sup>8</sup>

Another such exclusion, which is the focus of this essay, is the refusal by certain law enforcement agencies to permit registrants to remotely submit updates to their sex offender registration profiles. That is, while governments at all levels were busily transitioning public services to remote platforms, many law enforcement agencies rigidly insisted that registrants defy the Governor’s Stay-at-Home Order, as well as the commonsense guidelines of health officials, and register in-person. This mandate exposed registrants and others to a risk of infection despite no express statutory requirement for in-person registration.

Although in-person registration is a mere inconvenience for some, it can be a life-threatening event for others who suffer from one or more high-risk

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5. See Declaration of Dr. R. Karl Hanson, *Doe v. Harris*, No. C12-5713, 2012 WL 6101870 (N.D. Cal. Nov. 7, 2012); CAL. SEX OFFENDER MGMT. BD., A BETTER PATH TO COMMUNITY SAFETY: SEX OFFENDER REGISTRATION IN CALIFORNIA “TIERING BACKGROUND PAPER” 4-5 (2014) [hereinafter “TIERING BACKGROUND PAPER”], <http://www.casomb.org/docs/Tiering%20Background%20Paper%20FINAL%20FINAL%204-2-14.pdf>.

6. Until July 1, 2021, the only possibility of removal from California’s registry is through the certificate of rehabilitation process codified at section 4852.01 of the California Penal Code. CAL. PENAL CODE § 290.5(a). However, most registrants are either ineligible for a certificate of rehabilitation or required to register even if they receive a certificate. See CAL. PENAL CODE §§ 4852.01(c), 290.5(a)(2). Effective July 1, 2020, the California registry will become a tiered system. S.B. 384, 2017 Leg., Reg. Sess. (Cal. 2017). No registrant will be automatically removed from the tiered registry but must petition the court and may face opposition from the District Attorney. *Id.*

7. “The California Department of Corrections and Rehabilitation (CDCR) is amplifying actions to protect staff” and people incarcerated in the state’s prisons by allowing eligible inmates with 180 days or less remaining on their sentence to be released to parole or probation supervision prior to their original release date. *Expedited Releases*, CAL. DEP’T OF CORR. AND REHAB., <https://www.cdcr.ca.gov/covid19/expedited-releases/> (last visited Sept. 30, 2020).

8. “In order to be eligible, inmates must meet the following criteria: . . . Have no current or prior sentences that require them to register as a sex offender under Penal Code 290.” *Id.*

factors for COVID-19 identified by the Centers for Disease Control.<sup>9</sup> In addition, in-person registration can disrupt and even prevent steady employment and other facets of life, especially for homeless registrants who must appear once every 30 days to verify information that law enforcement usually possess already.<sup>10</sup> These difficulties are vastly compounded if vulnerable registrants are forced from their homes during a pandemic, thereby exposing themselves and others to the risks of infection and death that the state has otherwise worked to limit.

This essay outlines some of the challenges the authors faced as they advocated for the inclusion of registrants in the state's efforts to combat COVID-19. Part II discusses the procedures that govern California registrants and the collateral consequences that arise from the laws applicable to them. Part III outlines California's response to COVID-19 mitigation efforts and details some challenges faced by the authors when registrants were excluded from these mitigation efforts. The most notable among the challenges was the unprecedented closure of most branches of the Superior Court throughout the State of California.<sup>11</sup> Without this essential forum, registrants were at the mercy of local law enforcement's individual registration policies, which implicated registrants' health and perhaps their lives in unprecedented ways. Part IV describes the Governor's eventual intervention on behalf of registrants, which led to an easing of in-person registration policies in some jurisdictions. And ultimately, Part V concludes.

## II. REGISTRANTS AND THE COLLATERAL CONSEQUENCES THEY FACE

*"Not all sex offenders are the same,"*<sup>12</sup> but the law nonetheless treats them as such, perpetuating the false narrative that registrants comprise a monolithic and homogeneous category.<sup>13</sup> In reality, registrants are frequently dissimilar—dissimilar in terms of the conduct that gave rise to their convictions; dissimilar in age, race, profession, and life circumstances;

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9. *People at Increased Risk*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html> (last updated Sept. 11, 2020).

10. CAL. PENAL CODE § 290.011(a) (West 2014).

11. *See infra* Part III(B).

12. *United States v. Wolf Child*, 699 F.3d 1082, 1094 (9th Cir. 2012) (emphasis added).

13. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1119 (2012); *see also* Guy Hamilton-Smith, *Banishing 'Sex Offenders': How Meaningless Language Makes Bad Law*, 50 SW L. REV. 44, 52 (2020) ("We talk about *sex offenders* like they are something real—a category of person that can be meaningfully described with a label that tells us something about who they are, what they do, how they spend their days. Those answers, in turn, inform what society must do about them, to them, with them.").

and dissimilar in terms of their present risk of re-offending.<sup>14</sup> To illustrate, the California Sex Offender Management Board (CASOMB)<sup>15</sup>—the state entity responsible for recommending policy regarding registrants<sup>16</sup>—has explained that “[a] number of assumptions support the creation and maintenance of sex offender registries. Although these assumptions are widely held, accumulating scientific research on the actual realities makes it clear that *these assumptions are, in almost every case, not accurate.*”<sup>17</sup> For example, in response to the “assumption” that “[s]ex offenders are all alike and should be treated alike,” CASOMB explains that “[s]ex offenders differ in many important ways, including their risk to reoffend.”<sup>18</sup> In particular, “research has made clear that: [t]he sexual recidivism rate of identified sex offenders is lower than the recidivism rate of individuals who have committed any other type of crime except for murder.”<sup>19</sup>

Some courts recognize this, including the Ninth Circuit Court of Appeals, which declared in 2012 that “[n]ot all sex offenders are the same; nor are all who plead to a particular type of sex offense.”<sup>20</sup> Nevertheless, the registry and its categorical treatment of registrants persists, along with the sometimes byzantine set of collateral consequences it has spawned.<sup>21</sup>

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14. See, e.g., Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015); “TIERING BACKGROUND PAPER,” *supra* note 5, at 9.

15. CAL. SEX OFFENDER MGMT. BD., <http://www.casomb.org> (last visited Aug. 30, 2020).

16. See CAL. PENAL CODE §§ 9001-9002.

17. “TIERING BACKGROUND PAPER,” *supra* note 5, at 2 (emphasis added).

18. *Id.*

19. *Id.* at 4.

20. *United States v. Wolf Child*, 699 F.3d 1082, 1094 (9th Cir. 2012).

21. The authors have counted over eighty California statutes and regulations that impose a mandate or a legal disability upon some or all registrants as a class. A smattering of examples include statutes and regulations by which registrants are: (a) Presumed to be a significant risk to their own children in family court proceedings related to custody and visitation, CAL. FAM. CODE § 3030.5(b) (West 2020); (b) Presumptively ineligible to be reunited with biological children that have been removed from the home for any reason, CAL. WELF. & INST. CODE § 361.5(b)(16) (West 2016); (c) Required to carry U.S. Passports bearing a “unique identifier” indicating that they were convicted of an offense against a minor, 22 U.S.C. § 212b; (d) Ineligible to provide or receive payment for in-home supportive services to disabled persons for ten years, CAL. WELF. & INST. CODE § 12305.87(b)(2); (e) Ineligible for loans, grants, or funds under the federal State Small Business Credit Initiative, 12 U.S.C. § 5710(b)(2); and (f) Excluded from mental health diversion programs, even if the offense was motivated by mental illness and the registrant was willing to respond to treatment, CAL. PENAL CODE § 1001.36(b)(1)-(2).

A. *A Brief Description of Sex Offender Registration Procedures*

The requirements of registration in California are spelled out in the statutes codified at Penal Code section 290, et seq.<sup>22</sup> Although the registry itself is maintained at the state level by the California Department of Justice, the collection of the information contained in the registry is the responsibility of local law enforcement agencies, termed “registering agencies.”<sup>23</sup> Those registering agencies, comprising over 100 local police and sheriff’s departments in all fifty-eight California counties, perform this function when individual registrants appear at legally specified intervals to supply the information mandated by the applicable statutes.<sup>24</sup>

Significantly, the registration process involves precisely the type of interpersonal contact and exposure that can transmit the coronavirus that causes COVID-19, particularly in large jurisdictions such as Los Angeles or San Diego. That is because the registration process can require prolonged presence in crowded police and sheriff’s stations, where physical distancing may not be possible, further increasing the risk of transmission.

For example, the City of San Diego provides only one location for its roughly 3,000 registrants to register.<sup>25</sup> That location, on the ground floor of the San Diego Police Department’s downtown headquarters, is a dedicated window in a narrow hallway adjacent to the main lobby of the station. Registrants appear during specified time periods in the morning or afternoon, without an appointment, and wait their turn while sitting in a row of cramped stadium seats inches from the other registrants. While waiting, the registrants are likely to encounter other members of the public who, in various states of excitement, occupy the same hallway in order to retrieve property previously seized by the police. When finally called to approach the window, registrants are provided the same forms, clipboards, and pens that have been passed back and forth from and among other registrants and law enforcement throughout the day. In the case of initial registration into the jurisdiction, fingerprints are taken using a LiveScan machine, which is operated by a law enforcement official who physically places and manipulates the registrants’ fingers and hands on a scanner while standing in close proximity to the registrant. From personal knowledge and experience working with registrants, the registration process in San Diego, as in most other jurisdictions, can easily take an hour

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22. CAL. PENAL CODE § 290.

23. *Id.* § 290(b).

24. *See, e.g., id.* § 290.012(a).

25. Telephone Interview with Headquarters Front Counter, San Diego Police Dept. (Nov. 11, 2020); *see also* CAL. MEGAN’S LAW WEBSITE, <https://www.meganslaw.ca.gov> (last visited Nov. 11, 2020).

or more, during which time the registrants and other visitors to the station remain in close, unventilated quarters.

More extreme registration procedures exist. For example, one of the authors has experience representing clients in challenges to the City of Santa Ana's past registration practices. Those included forcing a large group of registrants to remove all street clothing above the waist, don an inmate's shirt, and corral into a holding cell for several hours while their registrations are processed.<sup>26</sup>

### B. *The Collateral Consequences of Registration*

Among the more pernicious collateral consequences of registration is the routine and often permanent exclusion of registrants from public benefits, civic responsibilities, and employment opportunities afforded to other persons, including to other persons with criminal records.<sup>27</sup> These exclusions persist long after registrants have been released from parole or other forms of supervision.<sup>28</sup>

For example, registrants in California can be subject to draconian restrictions on the locations where they may reside, such as geographic residency restrictions<sup>29</sup> and federal regulations prohibiting them from residing in subsidized housing.<sup>30</sup> Such restrictions perpetuate the high rates of homelessness among registrants that CASOMB has declared "the single greatest obstacle to the effective management of sex offenders in California."<sup>31</sup>

Registrants are also excluded from important civil responsibilities, such as jury service, despite recent reforms allowing even persons convicted of

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26. Ron Gonzales, *Suit Challenges Santa Ana's Sex Offender Law*, ORANGE CNTY. REG., (May 10, 2013, 9:46 PM), <https://www.ocregister.com/2013/05/10/suit-challenges-santa-anas-sex-offender-law/>.

27. AM. BAR ASS'N, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: JUDICIAL BENCH BOOK 7* (2018).

28. See Paige Reed, *Punishment Beyond Incarceration: The Negative Effects of Sex Offender Registration and Restrictions*, 5 J.L. & CRIM. JUST. 16, 21-25 (2017).

29. See, e.g., CAL. PENAL CODE §§ 3003.5(b); CAL PENAL CODE § 3003(g); CAL. CODE REGS. tit. 15, § 3582 (2020); see also *In re Taylor*, 343 P.3d 867, 869, 873, 880 (Cal. 2015) (striking down blanket application of residency restrictions to parolees under section 3003.5(b) of the California Penal Code in part because the statute "severely restricted [registrants'] ability to find housing in compliance with the statute," rendered "huge swaths of urban and suburban San Diego, including virtually all of the downtown area, completely consumed by the [residency] restrictions," and excluded registrants from "approximately 97% of the multifamily rental housing units . . . that would otherwise be available to them").

30. 42 U.S.C. § 13663.

31. CAL. SEX OFFENDERS MGMT. BD., *HOMELESSNESS AMONG CALIFORNIA'S REGISTERED OFFENDERS: AN UPDATE 1*(2011), [http://www.casomb.org/docs/Residence\\_Paper\\_Final.pdf](http://www.casomb.org/docs/Residence_Paper_Final.pdf).

murder or false statement crimes to serve on juries.<sup>32</sup> Such exclusions are significant because, as research by California State University Professor James F. Binnall has found, “juror eligibility facilitates changes in convicted felons’ self-concepts, promoting prosocial identity transformation, tempering the stigma of a felony conviction and prompting the discovery of self-worth.”<sup>33</sup> Yet, the California Legislature has denied these opportunities to registrants while extending them to nearly all other persons with felony convictions.

In a concurrently published and incisive article entitled *All Except For: Animus that Drives Exclusions in Criminal Justice Reform*, Professor Catherine L. Carpenter of Southwestern Law School explores the routine, counterproductive, and seemingly arbitrary exclusion of registrants from criminal justice reform efforts throughout the country.<sup>34</sup>

Finally, and perhaps most significantly for their daily lives, registrants are also categorically barred from holding dozens of professional and occupational licenses,<sup>35</sup> and are even barred from widely available and

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32. CAL. CIV. PROC. CODE § 203(a)(11) (West 2006 & Supp. 2020).

33. James F. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service* (2017), 43 LAW & SOC. INQUIRY 4, 21 (2017). Professor Binnall’s survey of felons who had served as jurors included registrants. *See id.* at 7-8; *see also* James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?* (2014), 36 LAW & POL’Y 1, 32-33 (2014).

34. Catherine L. Carpenter, *All Except For: Animus that Drives Exclusions in Criminal Justice Reform*, 50 SW. L. REV. 1 (2020).

35. Registrants are prohibited from obtaining any occupational or professional license if the licensing agency determines that the registrant committed an act “substantially related” to the duties of that occupation or profession. CAL. BUS. & PROF. CODE § 480(a)(1)(A), (a)(2) (West 2019). In practice, most agencies treat registrable offenses as substantially related to the profession and deny the license application. Appealing that denial requires legal representation and legal resources that most registrants cannot access, particularly if their chosen profession is among the less lucrative. In addition, registrants are prohibited by law from dozens of occupations and professions, including: Ambulance Driver, CAL. VEH. CODE § 13372(a)(1) (West 2006); Ambulance Attendant, CAL. CODE REGS. tit. 13, § 1101(b)(1) (2020); Acupuncturist, CAL. CODE REGS. tit. 16, § 1399.469.1(a) (2020); Certified Access Specialist, CAL. CODE REGS. tit. 21, § 161(c)(2); Chiropractor, *see* CAL. CODE REGS. tit. 16, § 317(h); Daycare Operator, CAL. HEALTH & SAFETY CODE § 1596.871(a)(1) (West 2008 & Supp. 2020); Dental Hygienist, BUS. & PROF. CODE § 1958.1(a); Dentist, *id.* § 1687(a); CAL. CODE REGS. tit. 16, § 1018(c); Emergency Medical Technician or Paramedic, CAL. CODE REGS. tit. 22, § 100174(a)(1); Home Health Care Worker, absent waiver, *id.* § 130110(a)(1); Horse Racing Board, any profession licensed by the board, CAL. CODE REGS. tit. 4, § 1489(a)(1); Insurance Broker, Bail Agent, or Bail Permittee, CAL. CODE REGS. tit. 10, § 2183.2(b)(4); Licensed Marriage and Family Therapist, BUS. & PROF. § 4980.40(e); Licensed Professional Clinical Counselor, *id.* § 4999.51(b); Licensed Educational Psychologist, *id.* § 4989.24; Massage Therapist, *id.* § 4609(a)(11)(c); CAL. GOV’T. CODE § 51032(b) (West 2012); Medical Doctor, BUS. & PROF. § 2232; Midwife, *id.* § 2523; Naturopathic Doctor, CAL. CODE REGS. tit. 16, § 4256(c); Nurse, BUS. & PROF. § 2760.1(i); CAL. CODE REGS. tit. 16, § 1444(d); Occupational Therapist, BUS. & PROF. § 2570.32(f); CAL. CODE REGS. tit. 16, § 4146(d)(8); Optometrist, BUS. & PROF. § 3046; Psychologist, *id.* § 2964.3; Psychoanalyst, *id.* § 2529.6(a); Psychiatric Technician, *id.* § 4524(e);

generally low-income jobs, such as those in elder care<sup>36</sup> or ride hailing services.<sup>37</sup>

Registrants who seek to build fulfilling and law-abiding lives encounter these and other legal barriers with frequency. The result, as Guy Hamilton-Smith articulates, is the sense that the state and society not only shun registrants but “actively oppose[] them.”<sup>38</sup> This opposition can undermine the very factors necessary to build a stable life free of re-offense—a consequence that CASOMB details at length in its reports.<sup>39</sup> As CASOMB explains:

[The “consequences” of registration] include serious obstacles to finding appropriate housing – or any housing; obstacles to finding employment; obstacles to developing positive support systems; obstacles to developing close relationships; and obstacles to reintegrating successfully into communities. Such consequences attach to the requirement to register as a sex offender and can, in fact, exacerbate risk factors thereby actually increasing an offender’s level of risk for re-offense.<sup>40</sup>

It is therefore ironic that the exclusion of registrants from the nation’s public life and economic sphere are typically defended on the grounds of “public safety.”<sup>41</sup> Yet, some exclusions are not defensible even by appeals to public safety because the effect of the exclusion is so obviously unrelated to public safety. One example is the statutory disqualification of registrants from a state program that compensates the victims of violent crime when a registrant is him- or herself a victim of violent crime.<sup>42</sup> In terms of a person’s capacity to be victimized by violent crime, registrants are in the same position

CAL. CODE REGS. tit. 16, § 2579.11(a); Speech Pathologist or Audiologist, CAL. CODE REGS. tit. 16, §§ 1399.130.1(a), 1399.156.5(a); Polysomnography [sleep disorders], BUS. PROF. § 3576.2(a); Physician Assistant, CAL. CODE REGS. tit. 16, § 1399.523.5(a); Pharmacist, *id.* § 1762(c); Physical Therapist, BUS. & PROF. § 2660.5; CAL. CODE REGS. tit. 16, § 1399.23(a); Realtor, *see* CAL. CODE REGS. tit. 10, §§ 2910(a)(5), 2911(a)(4), 2912(d); Respiratory Therapist, BUS. & PROF. § 3752.7; Social Worker, *id.* § 4996.2(d); Teacher, credentialed or certificated, CAL. EDUC. CODE §§ 44346(a)(2), (b)(2), 44425(a) (West 2006); Vocational Nurse, BUS. & PROF. § 2878.7(e); CAL. CODE REGS. tit. 16, § 2524(c).

36. CAL. HEALTH & SAFETY CODE §§ 1568.09(c)(4), (e)(2), 1569.17(a) (West 2016); CAL. CODE REGS. tit. 22, §§ 87819.1(a)(1), 87356(a)(1).

37. CAL. PUB. UTIL. CODE § 5445.2(a)(2)(A) (West 2020).

38. Guy Hamilton-Smith, *On America’s Civil Death Penalty: The Sexual Offense Registry*, COMPARATIVE PENOLOGY: GUEST BLOG (2018), <https://www.compen.crim.cam.ac.uk/Blog/blog-pages-full-versions/guest-blog-by-guy-hamilton-smith>.

39. “TIERING BACKGROUND PAPER,” *supra* note 5, at 4.

40. *Id.*

41. Sheila A. Campbell, *Battling Sex Offenders: Is Megan’s Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL LEGIS. J. 519, 536 (1995).

42. CAL. GOV’T CODE § 13956(c)(1) (West 2015 & Supp. 2020); CAL. CODE REGS. tit. 2, § 649.4(b)(3) (2020).



as non-registrants. Indeed, it can be argued that registrants are more vulnerable to crime because only registrants are publicly stigmatized by having their names, photographs, and home addresses listed on one or more government “Megan’s Law” websites. Such attacks have occurred.<sup>43</sup> Yet, state legislatures throughout the country deny this and other benefits to registrants, seemingly for no other reason than, as one federal circuit court concluded:

[To] brand registrants as moral lepers solely on the basis of a prior conviction[,] . . . consign[ing] them to years, if not a lifetime, of existence on the margins, not only of society, but often, . . . from their own families, with whom, due to [certain] restrictions, they may not even live.<sup>44</sup>

### III. EXCLUSION FROM CALIFORNIA’S COVID-19 MITIGATION MEASURES BECOMES ANOTHER COLLATERAL CONSEQUENCE OF REGISTRATION

Despite California’s sweeping response to the COVID-19 pandemic and Governor Newsom’s “Stay-at-Home” Executive Order, registrants were unjustly excluded from many protective measures, which threatened their health and safety. In the face of several obstacles, including court closures, the authors formulated strategies to encourage local law enforcement agencies to protect registrants by permitting remote registration.

#### A. California’s Response to the COVID-19 Pandemic

California’s first major, state-level response to the pandemic occurred on March 4, 2020, when Governor Gavin Newsom issued a State of Emergency Declaration.<sup>45</sup> Thereafter, on March 19, 2020, Governor Newsom issued a “Stay-at-Home” Executive Order, which incorporated certain directives promulgated by the California Department of Public Health.<sup>46</sup> Those directives “order[ed] all individuals living in the State of

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43. The authors are acquainted with one registrant, Mr. Frank Lindsay of Grover Beach, California, who in 2010 was physically attacked in his own home by a stranger whose goal, as acknowledged by law enforcement, was to “kill a sex offender.” The assailant forcibly entered Mr. Lindsay’s home, damaged his professional equipment, lay in wait for him, and attempted to murder him with, among other implements, a three-pound sledgehammer. Mr. Lindsay, whose sole offense occurred in 1979, was the second registrant that the perpetrator had tried to harm that day. *See*, Nick Wilson, *Man Gets 13 Years in Prison for Robbing Gas Station, Attacking Sex Offender*, THE TRIBUNE, (May 4, 2011, 11:23 PM), <http://www.sanluisobispo.com/news/local/article39150873.html>.

44. *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016).

45. Cal. Exec. Order No. N-33-20, at 1 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>.

46. *Id.*

California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.”<sup>47</sup> The Governor’s website explained that “[a]ll individuals living in the State of California are currently ordered to stay home or at their place of residence, except for permitted work, local shopping or other permitted errands, or as otherwise authorized.”<sup>48</sup>

The purpose of the Stay-at-Home Order, as well as the health directives, was to limit the opportunities for people to congregate or to otherwise expose themselves to infected persons. The Executive Order stated that “[w]hen people need to leave their homes or places of residence, whether to obtain or perform the functions [permitted], or to otherwise facilitate authorized necessary activities, they should at all times practice social distancing.”<sup>49</sup>

Conspicuously, the Executive Order contained no provision allowing persons to leave their home when mandated to do so by law, or when a statute, regulation, or agency practice required persons to appear in person to perform arguably essential transactions, or to receive important benefits.<sup>50</sup> For example, California law mandates that certain persons renew their driver’s license in person at a DMV office when they hold a probationary driver’s license, are 70 years of age or older, or have previously renewed by mail two consecutive times for five-year periods.<sup>51</sup> Similarly, certain persons applying for temporary economic assistance from the CalWORKs program (for which demand understandably increased during the pandemic), are required to appear in person to confirm their identities as well as other eligibility criteria.<sup>52</sup> Finally, as discussed more fully below, the statutes governing sex offender registration require in-person appearances at local police or sheriff’s stations in some situations.<sup>53</sup>

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47. *Id.*

48. *About COVID-19 Restrictions*, COVID19.CA.GOV, <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (last updated Nov. 20, 2020, 8:59 AM).

49. Cal. Exec. Order No. N-33-20, at 2 (Mar. 19, 2020).

50. *See id.*

51. *See* CAL. VEH. CODE § 12814.5 (West 2010 & Supp. 2020) (authorizing renewal of driver’s license by mail with the exceptions described above); *see generally id.* § 12814(a) (general mandate for in-person license renewal).

52. *E.g.*, CAL. WELF. & INST. CODE § 10831 (2020); CAL. DEP’T OF SOC. SERVS., MANUAL OF POLICIES AND PROCEDURES 50 (2014), <https://www.cdss.ca.gov/Portals/9/Regs/2EAS.pdf?ver=2019-01-04-170130-737> (certain applicants “must present a form of photo identification in person at the time of application.”); WELF. & INST. § 11052.5(a) (“An applicant shall not be granted public assistance under Chapter 2 (commencing with Section 11200) and Chapter 5.1 (commencing with Section 13000) until he or she is first personally interviewed by the office of the county human services agency or state staff for patients in state hospitals.”).

53. CAL. PENAL CODE §§ 290.011(f), 290.013(a), 290.014(a) (West 2014).

Nevertheless, if the pandemic has educated Americans about anything, it is that many tasks previously accomplished in person can in fact be accomplished remotely. The Governor's office officially recognized the same, for in weeks following the issuance of the Stay-at-Home order, the Governor exercised his authority under section 8571 of the California Government Code and began issuing a series of Executive Orders that temporarily suspended dozens of in-person mandates contained in various statutes and regulations.

For example, on March 20, 2020, the day after the Stay-at-Home order was issued, the Governor permitted two Special General Elections called for May 12, 2020, to be performed by mail-in-ballot, even though "state law would ordinarily require that these elections be conducted using in-person voting at polling locations throughout the jurisdiction."<sup>54</sup>

The Governor's order based this decision on his judgment that "generalized use of in-person voting presents risks to public health and safety in light of the COVID-19 pandemic, and could risk undermining social distancing measures imposed by the State Public Health Officer, as well as other aspects of the response to COVID-19."<sup>55</sup>

Many similar orders followed, including those suspending in-person mandates that are ostensibly rooted in public safety concerns. On April 16, 2020, the Governor temporarily suspended the fingerprinting component of background checks for a large number of professional and vocational licenses.<sup>56</sup> On April 23, 2020 and May 1, 2020, the Governor temporarily suspended in-person mandates for the driver's license renewals and CalWORKs applications mentioned above.<sup>57</sup> On March 27, 2020, the Governor temporarily eliminated the requirement that parties to civil actions be deposed in person, thereby authorizing remote depositions.<sup>58</sup> On April 30, 2020, the Governor even suspended the requirement that marriage

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54. Cal. Exec. Order No. N-34-20, at 1 (Mar. 20, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.20.20-N-34-20.pdf>.

55. *Id.*

56. Cal. Exec. Order No. N-52-20, at 3 (Apr. 16, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-52-20-text.pdf>.

57. Cal. Exec. Order No. N-40-20, at 4 (Mar. 30, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.30.20-N-40-20.pdf> (temporarily waiving in-person DMV renewals); Cal. Exec. Order No. N-59-20 (May 1, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.1.20-EO-N-59-20-text.pdf> (suspending in-person identity verification for CalWORKs applications); Governor Newsom's Executive Orders are collected at <https://www.gov.ca.gov/category/executive-orders/>.

58. Cal. Exec. Order No. N-38-20, at 2 (Mar. 27, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-N-38-20.pdf>; *see* CAL. CIV. PROC. CODE § 2025.310(b) (West 2004 & Supp. 2020); CAL. CT. R. 3.1010(c) (West 2017).

ceremonies be performed in person, allowing a “valid marriage” to be performed by “videoconference.”<sup>59</sup>

The nature of the Governor’s authority to suspend such laws is noteworthy. Section 8571 of the California Government Code states that,

During . . . a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, . . . *where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.*<sup>60</sup>

In other words, the Governor’s orders were a recognition that requiring a person to appear in person to vote, to attend a deposition, or renew their driver’s licenses, etc., would “prevent, hinder, or delay the mitigation” of the COVID-19 emergency. This reasoning makes good sense, since those transactions require close interaction among people, and therefore pose a risk of COVID-19 infection.

### *B. Fighting the Unjust Exclusion of Registrants from COVID-19 Mitigation Efforts*

Immediately after the Stay-at-Home Order was issued, and as the threat of COVID-19 became more widely understood by the public, the authors began fielding concerned inquiries from registrants with high-risk factors, as well as others who were concerned about the risk of transmission during their registration appointments at local police and sheriff’s stations.

If the government’s warnings were accurate, prolonged exposure during lengthy registration appointments presented a risk of infection, particularly to elderly registrants and to those otherwise vulnerable to the disease. This risk was confirmed by the Governor’s recent decision to proactively lift the in-person mandates applicable to similarly intimate interactions with government authorities, such as DMV renewals and fingerprinting requirements.<sup>61</sup>

Moreover, in terms of the actual legal requirements applicable to them, registrants have an even stronger case for an exemption than others. That is because the registration statutes require a registrant to appear “in person” in only three relatively infrequent circumstances: (1) an official change of

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59. Cal. Exec. Order No. N-58-2020 (Apr. 30, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.30.20-EO-N-58-20-text.pdf>.

60. CAL. GOV’T CODE § 8571 (West 2012) (emphasis added).

61. See *supra* notes 54-60 and accompanying text.

residence;<sup>62</sup> (2) when a transient moves out of the state,<sup>63</sup> and (3) when a registrant legally changes his or her name.<sup>64</sup> In contrast, the majority of registration appointments do not involve a change of address, departure from the state, or a legal name change. Rather, these “periodic updates” are designed to confirm or revise information previously provided by the registrant to law enforcement during an earlier, in-person registration event.

For example, the periodic update with which all registrants must comply is the annual update required by section 290.012 of the California Penal Code.<sup>65</sup> During an annual update, registrants must verify their present address, as well as report any changes in employment, and similar information.<sup>66</sup> In addition, registrants deemed “transient” because they have no fixed address at which they regularly reside,<sup>67</sup> must, every 30 days, confirm their presence in the jurisdiction and describe the locations they frequent.<sup>68</sup> The statutes governing these and other periodic updates merely require that registrants “register” and “update” their registration, but do not require individuals to do so “in person.”<sup>69</sup>

In light of this, the authors realized that a basic statutory interpretation argument could be developed to prevent in-person registration for periodic updates, consistent with the plain text of the Sex Offender Registration Act. The Act mandates that, during each periodic update, the registrant must “provide current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 290.015.”<sup>70</sup> The DOJ Form referred to, No. CJIS 8102S, is published by the DOJ and available freely online from some local registering agencies.<sup>71</sup> Taken together, the DOJ form No. CJIS 8102S and section 290.015, require a registrant to submit 18 pieces of information during a periodic update in a “writing” that is “signed by the registrant.”

1. Name
2. Residence addresses

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62. CAL. PENAL CODE § 290.013(a) (West 2014).

63. *Id.* § 290.011(f).

64. *Id.* § 290.014(a).

65. *Id.* § 290.012.

66. *Id.* §§ 290.012(a), 290.011(c).

67. *Id.* § 290.011(g).

68. *Id.* §§ 290.011, 290.012(c).

69. *Id.* §§ 290.011(c), 290.012(a), (c).

70. *Id.* § 290.012(a).

71. CAL. DEP’T OF JUST. SEX OFFENDER REGISTRATION FORM CJIS 8102S (2020), [https://sheriff.calaverasgov.us/Portals/Sheriff/Documents/Records\\_Civil/Registrants/Sex Offender Registration Form.pdf](https://sheriff.calaverasgov.us/Portals/Sheriff/Documents/Records_Civil/Registrants/Sex%20Offender%20Registration%20Form.pdf).

3. Date of birth
4. Aliases used
5. Place of birth
6. Phone number(s)
7. Physical description of the registrant (including tattoos or distinguishing marks)
8. Name and address of the registrant's employer
9. Address of the registrant's place of employment if that is different from the employer's main address
10. Driver's license number
11. The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the registrant
12. VIN and description of vehicles owned or regularly driven by the registrant
13. A list of all Internet identifiers used by the registrant, as required by Section 290.024
14. Numbers by which law enforcement tracks the registrant
15. Emergency contacts
16. Name and phone number of probation officer
17. The registrant's fingerprints
18. A current photograph of the registrant taken by the registering official<sup>72</sup>

The absence of an express in-person registration requirement in the governing statutes has not stopped local law enforcement or the Department of Justice from inferring such a requirement based upon the inference that a registrant cannot place his "signature" on a "writing," or provide "fingerprints" and a "current photograph taken by the registration official" other than in person.<sup>73</sup> The DOJ communicates this implied in-person requirement in No. CJIS 8102S itself, but does not cite a statute that expressly includes that requirement.<sup>74</sup> That is, Form CJIS 8102S requires the registrant to sign the following statement: "I must annually update my registration information *in person*, within five (5) working days before or after my birthday, at the law enforcement agency having jurisdiction over my residence address or where I am currently present as a transient."<sup>75</sup> A citation

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72. *Id.*; CAL. PENAL CODE §§ 290.015, 290.024.

73. CAL. DEP'T OF JUST. SEX OFFENDER REGISTRATION FORM, *supra* note 71; SACRAMENTO CNTY. SEX OFFENDER REGISTRATION REQUIREMENTS (2020), [https://www.sacsheriff.com/Pages/Organization/CID/documents/290\\_requirements.pdf](https://www.sacsheriff.com/Pages/Organization/CID/documents/290_requirements.pdf).

74. CAL. DEP'T OF JUST. SEX OFFENDER REGISTRATION FORM, *supra* note 71.

75. *Id.* at 3 (emphasis added).

to section 290.012 of the California Penal Code immediately follows this statement; yet, as explained above, section 290.012 contains no in-person registration requirement.<sup>76</sup> Nevertheless, pre-COVID, every local registering agency in California with which the authors are familiar required that periodic updates occur in person.

Nevertheless, the realities of registration, coupled with available technology, undermine the need for an implied in-person registration requirement for periodic updates. Specifically, DOJ form No. CJIS 8102S can be completed remotely, and signed with either an electronic signature or an ink signature that is later mailed in. The “fingerprints” actually required by DOJ form No. CJIS 8102S are merely a single thumb print on the bottom-right corner of each page,<sup>77</sup> which in practice is routinely applied by the registrant himself using an ink pad. As to photographs, the law only requires a “current” photograph, not a “new” photograph, meaning that law enforcement could use an existing photograph of the registrant that remains “current.”<sup>78</sup> Videoconference technology and video apps also allow photographs to be taken remotely.

In addition, an implied in-person registration requirement offends the canon of statutory construction that opposes legislation by implication. That is, the fact that the Sex Offender Registration Act expressly imposes in-person registration requirements on certain occasions, but not for periodic updates, provides a statutory basis to oppose in-person periodic updates. The relevant canon of construction holds that,

When confronted with two statutes, one of which contains a term, and one of which does not, [courts] do not import the term used in the first to limit the second. Instead, it is [the court’s] obligation to interpret different terms used by the Legislature in the same statutory scheme to have different meanings.<sup>79</sup>

Accordingly, “[w]here, as here, the Legislature has chosen to include a phrase [e.g., “in-person”] in one provision of the statutory scheme, but to omit it in another provision, we presume that the Legislature did not intend the language included in the first to be read into the second.”<sup>80</sup> Thus, registrants have colorable factual and statutory arguments against in-person registration.

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76. *Id.*; CAL. PENAL CODE § 290.012.

77. CAL. DEP’T OF JUST. SEX OFFENDER REGISTRATION FORM, *supra* note 71.

78. *Id.*

79. *Walt Disney Parks & Resorts U.S., Inc. v. Super. Ct.*, 230 Cal. Rptr. 3d 811, 815-16 (Ct. App. 2018); *see also* *Wilson v. City of Laguna Beach*, 7 Cal. Rptr. 2d 848, 855 (Ct. App. 1992).

80. *Walt Disney Parks*, 230 Cal. Rptr. 3d at 816; *Wilson*, 7 Cal. Rptr. 2d at 855.

Common sense dictates the same result if one looks beyond the formality of registration to the actual practice of it. For example, most periodic updates consist of the registrant appearing at his local police station to resubmit or confirm the same address, employment, and vehicle information that he provided the year before. He may or may not be photographed, he completes the forms, and the leaves. The records of law enforcement, including those portions released to the public, are maintained and kept current, fulfilling their purpose to keep registrants “readily available for police surveillance at all times.”<sup>81</sup> Perhaps the only value of requiring this transaction to occur in person, rather than remotely, is to mitigate against the extremely remote possibility that the registrant would abscond from the jurisdiction and hide this fact by sending an imposter to complete the registration process for him. Yet, annual in-person registration does not truly mitigate this risk (an absconder need only appear at the police station annually to satisfy the registration requirement), and the draconian penalties for failing to comply with the registration statutes provide ample deterrent from evading any registration requirement.<sup>82</sup>

#### 1. The State’s Largest Jurisdiction Opts for Remote Registration, but No Others Follow

Support for the authors’ interpretation of the registration laws soon came from an unlikely source—the Los Angeles Police Department (LAPD)—the agency with the largest population of registrants in the state.<sup>83</sup> Within days of the Governor’s Stay-at-Home Order, the LAPD spontaneously and voluntarily suspended all in-person registration and began processing all

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81. *Wright v. Superior Ct.*, 936 P.2d 101, 104 (Cal. 1997).

82. Pursuant to California Penal Code, the severity of the punishment for failure to register turns on the severity of the sex offense giving rise to registration. A person who fails to register based upon a misdemeanor conviction is liable for misdemeanor failure to register, but a person who fails to register based upon a felony is liable for felony failure to register, which proposes a sentencing range of sixteen months to three years. CAL. PENAL CODE § 290.018(a)-(b). However, because the Penal Code treats many felony sex offenses as serious or violent offenses, the underlying felony sex offense conviction often counts as a strike, meaning that the sentencing range for even a first failure to register conviction is doubled. *Id.* §§ 290.018(b), 667(e)(1), 1170.12(c)(1) (mandatory minimum of sixteen months imprisonment doubled for second-strike offenders). Furthermore, if the registrant’s failure to register is based upon a federal sex offense, or involves interstate or international travel, the federal Sex Offender Registration and Notification Act imposes penalties of up to ten years federal custody. 18 U.S.C. § 2250(b).

83. CASOMB’s 2019 Annual Report shows 14,919 “active” registrants in Los Angeles County as of January 1, 2020, over 22% of the total. CAL. SEX OFFENDER MGMT. BD., ANNUAL REPORT 2019 23-24 (2019), [http://casomb.org/pdf/2019\\_Annual\\_Report.pdf](http://casomb.org/pdf/2019_Annual_Report.pdf).



registrations by telephone.<sup>84</sup> To communicate this change in policy to registrants, the LAPD displayed signs on the doors of its station that directed registrants to call a specific telephone number.<sup>85</sup>

Encouraged, the authors had assumed that other agencies would follow the LAPD's lead. They did not. In fact, the authors heard of no other registering agency suspending in-person registration in response to the Stay-at-Home Order. Instead, these agencies essentially nullified the Governor's Stay-at-Home Order by continuing to mandate in-person registration for periodic updates.

## 2. The Courts are Largely Closed to Registrants' Claims

The COVID-19 pandemic and the response to it uniquely handicapped many typical avenues for advocacy, most notably by closing or limiting access to the trial courts.<sup>86</sup> To illustrate, in the week following the Stay-at-Home Order, the authors filed five separate petitions in four separate venues on behalf of vulnerable registrants whose periodic updates were immanent.<sup>87</sup> Only one petition, in the Los Angeles Superior Court, was immediately filed and given a case number.<sup>88</sup> In contrast, the San Diego Superior Court refused to file the petition submitted there.<sup>89</sup> Although the San Diego Superior Court permitted counsel to inquire by email whether emergency relief could be obtained in their case, the clerk of the court declined the authors' request to

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84. *LAPD Stops In-Person Registration, Provides Registration by Telephone*, ALL. FOR CONST. SEX OFFENSE L. (March 24, 2020), <https://all4consolaws.org/2020/03/lapd-stops-in-person-registration-provides-registration-by-telephone/comment-page-1/>.

85. *Id.*

86. See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 67 (2010) (arguing that, "[b]ecause of the emotionally charged nature of [legislation targeting registrants], judicial intervention may be the only realistic response.").

87. Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, All. for Const. Sex Offense L. v. Cal. Dep't of Just., No. 20STCV12138 (Cal. Super. Ct. L.A. Cnty. Mar. 26, 2020); Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, All. for Const. Sex Offense L. v. Sacramento Police Dep't, No. 34-2020-80003369 (Cal. Super. Ct. Sacramento Cnty. May 6, 2020); Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, All. for Const. Sex Offense L. v. Cal. Dep't of Just., No. 37-2000-16339 (Cal. Super. Ct. San Diego Cnty. May 26, 2020); Petition for Writ of Mandate and Complaint for Injunctive Relief, All. For Const. Sex Offense L. v. Murietta Police Dep't (Cal. Super. Ct. Riverside Cnty. Mar. 23, 2020) (petition submitted but rejected by the court) (on file with author); Petition for Writ of Mandate and Complaint for Injunctive Relief, All. For Const. Sex Offense L. v. San Diego Police Dep't (Cal. Super. Ct. San Diego Cnty. Mar. 25, 2020) (petition submitted but rejected by the court) (on file with author).

88. Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, All. for Const. Sex Offense L. v. Cal. Dep't of Just., No. 02STCV12138 (Cal. Super. Ct. Mar. 26, 2020).

89. Email from San Diego Cnty. Super. Ct. to author (Mar. 25, 2020, 11:51 PST) (on file with author).

file and hear the petition. The Superior Courts of Riverside and Sacramento Counties also refused to file the submitted petitions and advertised no opportunity for emergency relief. Indeed, the Superior Courts of Riverside and Sacramento Counties communicated nothing until the petitions were finally processed twelve and six weeks later, respectively.<sup>90</sup>

<b>Defendant</b>	<b>Venue</b>	<b>Date submitted</b>	<b>Date filed for acknowledged</b>
Murrieta Police Department	Riverside Superior	3/23/2020	6/23/2020
Sacramento Police Department	Sacramento Superior	3/24/2020	5/6/2020
San Diego Police Department	San Diego Superior	3/25/2020	5/26/2020
LAPD and Los Angeles County Sheriff's Department	Los Angeles Superior	3/26/2020	3/26/202
San Diego Sheriff's Department	San Diego Superior	3/27/2020	5/26/2020

Thus, in only one out of five cases were any registrants able to present a petition for relief from the in-person mandate imposed by their local registering agency. The Plaintiffs moved for a temporary restraining order in the Los Angeles County case based on the above-referenced statutory interpretation arguments, the fact that the LAPD had voluntarily suspended in-person registration weeks earlier, as well as analogies to cases in which civil detainees were ordered released due to the threat of COVID-19.<sup>91</sup>

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90. E-mail from Riverside Cnty. Super. Ct. to author. (Jun. 23, 3030, 03:28 PST) (on file with author); Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, All. for Const. Sex Offense L. v. Sacramento Police Dep't, No. 34-2020-80003369 (Cal. Super. Ct. Sacramento Cnty. May 6, 2020).

91. *Xochihua-Jaimes v. Barr*, 962 F.3d 1065, 1066 (9th Cir. 2020) (sua sponte ordering the immediate release of immigration detainees with a pending petition for review of a removal order “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers.”); see also *Thakker v. Doll*, 451 F. Supp. 3d 358, 372 (M.D. Pa. 2020).

Although the trial court acknowledged that the “plaintiffs have shown potential harm from denial of the temporary restraining order” (*i.e.*, from continued registration) the court denied preliminary relief, in part because of its view that “defendants [*i.e.*, law enforcement] have also shown harm from issuance of the temporary restraining order.”<sup>92</sup> The nature of the latter harm was not articulated in the order.<sup>93</sup>

### 3. The Closure of the Courts Relegates Registrants to Letters and Phone Calls

Because the Los Angeles County Superior Court was the only venue open to hear the registrants’ claims, the authors were left with a more grassroots form of advocacy in other jurisdictions, that is, letters and phone calls. Letters were sent on behalf of registrants to registering agencies in Oakland, San Bernardino County, San Francisco, and Lake County. In addition, multiple phone calls were made to registering agencies. One of the authors also leveraged contacts within legislative offices and the Governor’s office to advocate for the equal treatment for registrants in the various reprieves being considered and issued. In response to these efforts, some sympathetic registration officials followed the example of the LAPD and permitted a form of remote registration.<sup>94</sup> Others ignored the authors’ appeals and offered no accommodation for registrants, even if the registrants were at high risk for COVID-19.

## IV. SOME ASSISTANCE IN THE CONTINUING FIGHT FOR INCLUSION

In the midst of their letter-writing campaign, registrants received sudden and unexpected assistance from the Governor’s office. On the afternoon of Friday, May 8, 2020, the Governor issued an Executive Order exempting the in-person component of a new slate of laws and regulations, including, for the first time, sex offender registration.<sup>95</sup> Paragraph 15 of that Executive Order said:

15) Law enforcement agencies are encouraged to adopt telephonic, remote, or other procedures for registration and reporting under the Sex Offender Registration Act that are consistent with State and local public health

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92. Minute Order, *All. for Const. Sex Offense L. v. Cal. Dep’t of Just.*, No. 02STCV12138 (Cal. Super. Ct. Apr. 17, 2020).

93. *Id.*

94. Evan Sernoffsky, *Oakland Police Now Allowing Sex Offenders to Register Remotely or In-Person*, FOX 2 KTVU (May 14, 2020), <https://www.ktvu.com/news/oakland-police-now-allowing-sex-offenders-to-register-remotely-or-in-person>.

95. Cal. Exec. Order No. N-63-20 (May 7, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.7.20-EO-N-63-20-text.pdf>.

guidance regarding physical distancing, and to post or publicize such procedures through means calculated to reach any person subject to the Act.

a) To the extent that a law enforcement agency institutes telephonic, remote, or other procedures to enable physical distancing, all provisions of the Sex Offender Registration Act (Penal Code sections 290 to 290.024, inclusive) and implementing procedures that require persons subject to the Act to appear in person, and all provisions of the Act and implementing procedures that require such persons to provide a signature, fingerprints, and photographs, are suspended for 60 days.

b) To ensure that lack of technology does not prevent any individual from complying with registration and reporting requirements, law enforcement agencies are encouraged to provide alternative means of registration and reporting, including permitting the physical presence of registrants consistent with State and local public health guidance regarding physical distancing.<sup>96</sup>

Soon thereafter, on May 12, 2020, the Department of Justice issued Information Bulletin No. 20-07-CJIS to local registering agencies advising them of the Governor's Executive Order and providing specific instructions regarding how registration could be accomplished remotely.<sup>97</sup>

For the authors, this Executive Order was vindication. As noted above, the Governor's authority to suspend statutory requirements is limited to times of declared emergency when "strict compliance with [a] statute . . . would in any way prevent, hinder, or delay the mitigation of the effects of the emergency."<sup>98</sup> In fact, the May 8 Executive Order stated: "I find that strict compliance with various statutes and regulations specified in this order [e.g., the Sex Offender Registration Act] would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic."<sup>99</sup> In other words, the Governor acknowledged that in-person registration presented a risk of COVID-19 infection and that registration could be completed remotely. Indeed, the Governor's Order went further than the authors had advocated by authorizing remote registration on occasions when the statute expressly demands in-person appearance, such as the establishment of a new residence.<sup>100</sup>

The obvious limitation of this Executive Order is that its provisions are permissive, not mandatory, which was enough to permit courts to dismiss

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96. *Id.*

97. Cal. Service Info., Dep't of Just., 20-07 Info. Bull. No. 20-07-CJIS, Exec. Ord. N-63-20 RE: Sex Offender Registration 1-3, Cal. Dep't of Just. (2020), [https://oag.ca.gov/sites/all/files/agweb/pdfs/info\\_bulletins/20-07-cjis.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/info_bulletins/20-07-cjis.pdf).

98. CAL. GOV'T. CODE § 8571 (West 2012).

99. Cal. Exec. Order No. N-63-20 (May 7, 2020).

100. CAL. PENAL CODE § 290.013(a).

some of the above-referenced petitions as moot, but not enough to compel local registering agencies to permit remote registration. Thus, registrants were left in a position similar to that at the beginning, that is, with no firm legal ground on which to demand the protection of registrants from a now-recognized threat to their health. However, with the Governor's Order, legal barriers to remote registration had at least been removed.<sup>101</sup>

In the wake of the Governor's Executive Order on May 8, some jurisdictions, such as the city of Hollister, chose to continue in-person registration.<sup>102</sup> Fortunately, however, nearly all jurisdictions have now permitted vulnerable registrants to register remotely. Some jurisdictions, such as the City of Sacramento, even personally visited the homes of registrants who were at high risk for COVID-19 and completed registration there.<sup>103</sup> Yet, as with so many other aspects of the system to which they are subject, registrants lack accessible and clear guidance regarding their rights, the limitations on the authority of registering agencies, and the means to assert their rights when necessary.

## V. CONCLUSION

The COVID-19 pandemic has revealed fragility in many aspects of our society, including the frightening prospect of the court system being closed by the very factor that is causing a deprivation of rights in need of redress. The authors are grateful to Governor Newsom and his staff for recognizing that registrants deserve to be among those protected from COVID-19. It is the authors' hope that this essay will illuminate the legitimate needs and vulnerabilities of a group of people who are too often and easily neglected in criminal justice reform efforts,<sup>104</sup> and even, as revealed here, during public health crises.

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101. On June 30, 2020, the Governor issued Executive Order N-17-20, which extended the previously issued Executive Order authorizing remote registration "until this Order is modified or rescinded, or until the State of Emergency is terminated, whichever occurs sooner." Cal. Exec. Order No. N-71-20, at 6 (June 30, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.7.20-EO-N-63-20-text.pdf>.

102. *Hollister PD to Continue Registering Sex Offenders in Person*, SAN BENITO (May 19, 2020), <https://sanbenito.com/hollister-pd-to-continue-registering-sex-offenders-in-person/>.

103. Telephone Interview with Sacramento Police Dep't, SAFE Team (May 12, 2020); Telephone Interview with Sacramento Police Dep't, SAFE Team (May 26, 2020); Telephone Interview with Sacramento Police Dep't, SAFE Team (June 25, 2020).

104. See Catherine L. Carpenter, *All Except For: Animus that Drives Exclusions in Criminal Justice Reform*, 50 SW L. REV 1 (2020).